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THE MARITAL DEDUCTION: POWERS OF INVASION AND THE "ALL EVENTS" REQUIREMENT[†]

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ONE of the most important estate planning techniques is the proper utilization of the marital deduction provided by Section 2056 of the Internal Revenue Code.¹ One of the most important devices utilized in qualifying a devise or bequest for the marital deduction is the provision for a life estate with a power of appointment in the surviving spouse, under subsection 2056(b)(5).² However, the application of this device is complicated by the necessity of

[†] The opinions expressed in this article are the personal views of the authors and do not necessarily reflect the official position of the United States Department of Justice.

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¹ Unless otherwise indicated, all references will be to the Internal Revenue Code of 1954. There is also a correlative gift tax provision, § 2523, with identical problems. It is almost entirely in the estate tax area, however, that the problems discussed in this article have come to the fore.

² The statutory scheme operates briefly as follows. Section 2056(a) allows as a deduction from the gross estate an amount equal to the value of property interests (included in the gross estate) passing from the decedent to the surviving spouse, up to a maximum of 50 per cent of the adjusted gross estate. Section 2056(b)(1) provides that the deduction is not allowable, if the interest passing to the surviving spouse will lapse or terminate after a period of time and pass to persons other than the surviving spouse. This is called a "terminable interest," the most classic form of which is a life estate. Various exceptions to this restriction exist, however, the most important of which is contained in § 2056(b)(5).

meeting several technical requirements.³ Among these is the prerequisite that the surviving spouse⁴ be able to appoint an entire interest, or a specific portion thereof, to herself or her estate, alone and *in all events*.⁵ In several other respects the marital deduction requirements permit a certain amount of flexibility. It does not matter, for example, whether the interest passing to the surviving spouse is in trust or not.⁶ It is sufficient if the power is exercisable either by will or during life,⁷ although if such power is exercisable during life it must be fully exercisable at any time during life.⁸ Qualification for the marital deduction is possible for either the entire interest in the property passing from the decedent to his surviving spouse or a specific portion thereof.⁹ But in order to qualify, a power must meet *all* the requirements of section 2056(b)(5), the most drastic of which is the "all events" test. If the power fails to meet all the requirements, the interest passing

³ Treas. Reg. § 20.2056(b)-5(a)(1)-(5).

(1) The surviving spouse must be entitled for life to all of the income from the entire interest or a specific portion of the entire interest, or to a specific portion of all the income from the entire interest.

(2) The income payable to the surviving spouse must be payable annually or at more frequent intervals.

(3) The surviving spouse must have the power to appoint the entire interest or the specific portion to either herself or her estate.

(4) The power in the surviving spouse must be exercisable by her alone and (whether exercisable by will or during life) must be exercisable in all events.

(5) The entire interest or the specific portion must not be subject to a power in any other person to appoint any part to any person other than the surviving spouse.

⁴ For convenience, this article will generally assume that the surviving spouse is a widow, although, of course, this need not be the case. The statute itself makes no distinction on the basis of the sex of the surviving spouse.

⁵ Section 2056(b)(5).

⁶ Treas. Regs. § 20.2056(b)-5(a).

⁷ Section 2056(b)(5).

⁸ Treas. Regs. § 20.2056(b)-5(g)(1)(ii).

⁹ Section 2056(b)(5). Several of the earlier decisions denied the marital deduction because the surviving spouse's power only related to a part of, and not the entire, trust interest. *Estate of John C. Zeman*, 17 P-H Tax Ct. Mem. 336 (1958); *Estate of Harrison P. Shedd*, 23 T.C. 41 (1954), *aff'd*, 237 F.2d 345 (9th Cir. 1956), *cert. denied*, 352 U.S. 1024 (1957); *Estate of Louis B. Hoffenberg*, 22 T.C. 1185 (1954), *aff'd*, 223 F.2d 470 (2d Cir. 1955). This requirement was ameliorated by the 1954 code, which permitted "specific portions" of trust interests to qualify. Section 93 of the Technical Amendments Act of 1958 extended this relief retroactively to April 1, 1948. P.L. 85-866, 72 Stat. 1606.

to the surviving spouse will be deemed "terminable" under section 2056(b)(1) and the marital deduction will be lost.

This article will explore the "all events" test in the light of nearly two decades of experience. The subject has been the source of considerable litigation and is necessarily complex not only because of the detailed requirements of the statute and regulations, but also because of the myriadic forms of testamentary disposition and the impact of divergent state rules of law which are important in determining the nature of the powers created.

Since we are dealing in an area of precise terminology, it seems desirable to set forth the statutory provision in question together with material portions of the legislative history and regulations.

THE STATUTE, LEGISLATIVE HISTORY AND REGULATIONS

Section 2056(b)(5) provides:

Life Estate with Power of Appointment in Surviving Spouse.—

In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

The marital deduction was first enacted into law in 1948.¹⁰ Its primary purpose was to equalize the estate tax consequences of persons living in common law and community property states.¹¹ Therefore, outright gifts to the wife were generally required.¹²

Treasury Regulations Section 20.2056(b)-5(g)(3) implement the "all events" test as follows:

¹⁰ Int. Rev. Code of 1948, § 361(a).

¹¹ H.R. REP. NO. 1274, 80th Cong., 2d Sess. 24-26 (1948); 1948-1 CUM. BULL. 241, 260 (1948); S. REP. NO. 1013 (Part 1) 80th Cong., 2d Sess. 5, 26-29 (1948); 1948-1 CUM. BULL. 285, 303 (1948).

¹² In 1957, the House passed H.R. 8881 in an effort to modify § 2056 to make it clear that the surviving spouse need not have a testamentary power. H.R. REP. NO. 1027, 85th Cong., 1st Sess. p. 1, 3 (1957), accompanying H.R. 8881 contained the following excerpt:

In addition, the last sentence of subsection (a) of the bill provides that a power exercisable in all events includes an unrestricted power exercisable by the surviving spouse at any time during her life to use all or part of the property subject to the power, where the power includes the right to dispose of the property in any manner (including the power to dispose of it by gift), but such right does not have to include the power to dispose of the property by will. The purpose of this concluding sentence is to describe the general conditions under which the right of the surviving spouse to use, consume, or invade the property during life is the equivalent of the right to dispose of it by will and therefore the equivalent of a general power of appointment. This provision is intended to insure that the marital deduction will be allowed in cases where the property subject to the power would be includible in the gross estate of the spouse upon her death. Thus, where the spouse has a power to consume, invade, or appropriate the property, and she is the sole judge of what the invasion, consumption, or appropriation is needed for, such a power is intended to come within this provision. For example, if the surviving spouse has, in addition to a life interest, the unrestricted right, in her sole discretion, to invade and use the property generally for her comfort, happiness and well being, such a power would meet the test prescribed by the last sentence of subsection (a) even though there is no separately stated power to dispose of the property. These broad powers in the surviving spouse to use, consume, or invade give the spouse an interest equivalent to a general power of appointment, which makes the property includible in the spouse's gross estate upon death. From this it follows that the marital deduction is allowable with respect to such a property interest. This is the result under the 1954 Code and the bill makes it clear that it is to be the result under the 1939 Code.

H.R. 8881 died in the Senate Finance Committee and never became law. Instead, H.R. 8381, which ultimately became Section 93 of the Technical Amendments Act of 1958, included no parallel legislative history. The liberal verbiage of H.R. REP. NO. 1027, correlated to the rules under § 2041, was mistakenly cited by the district court in *Lincoln Rochester Trust Co. v. United States*, 188 F. Supp. 839 (W.D.N.Y. 1960), *corrected on appeal*, 297 F.2d 891 (2d Cir. 1962). See also *Piatt v. Gray*, 321 F.2d 79 (6th Cir. 1963).

Likewise, if there are any restrictions, either by the terms of the instrument or under applicable local law, on the exercise of a power to consume property (whether or not held in trust) for the benefit of the spouse, the power is not exercisable in all events. . . . In order for a power of invasion to be exercisable in all events, the surviving spouse must have the unrestricted power exercisable at any time during her life to use all or any part of the property subject to the power, and to dispose of it in any manner, including the power to dispose of it by gift (whether or not she has power to dispose of it by will).

The "all events" test is, however, made explicitly subject to several minor exceptions which are discussed below.

SECTION 2056(b)(5) AS APPLIED

Reservations to the "All Events" Test

Although the requirement that the widow be able to appoint an interest in favor of herself or her estate "in all events" implies and has been interpreted to be a test of most stringent application, the regulations have recognized that the test is not to be pushed to an utter extreme. Thus, delays in the distribution of property occasioned by the exercise of the power during the administration of the decedent's estate will not disqualify the interest.¹³ Limitations of a purely formal nature may also be ignored.¹⁴

¹³ Treas. Regs. § 20.2056(b)-5(g)(4). Estate of Wilhelmina L. Benjamin, 44 T.C. 598 (1965). It is imperative, however, that the widow actually have the requisite powers during the period of administration. This was the issue in *Robertson v. United States*, 310 F.2d 199 (5th Cir. 1962), reversing 199 F. Supp. 78 (N.D. Ala. 1961). The fifth circuit there held that under the terms of a somewhat ambiguous will, the widow did actually possess the power of disposition during the period of administration.

¹⁴ Treas. Regs. § 20.2056(b)-5(g)(4). Examples of formal limitations which do not disqualify a bequest for the marital deduction are: (during life), that the exercise be in a particular form; that it be filed with the trustee during the spouse's life; that reasonable notice be given; that reasonable intervals elapse between successive partial exercises; or (by will), that the power be exercised by will executed after the decedent's death; that exercise be made by specific reference to the power. In a gift tax case, *Kidd v. Patterson*, 230 F. Supp. 769 (N.D. Ala. 1964), the donor's wife was given the power to assign certain insurance policies subject to the insurer's approval. The purpose of such approval was to assure the *bona fides* of the arrangements. The court regarded the government's effort to disallow the marital deduction as "arid literalism" and found the wife the absolute owner.

Moreover, the widow need not actually exercise her power for qualification, and, if takers in default of exercise are named by the decedent, this will not prejudice the marital deduction either.¹⁵ Further, the use of a spendthrift clause has recently been found not to be inconsistent with an unlimited power of appointment.¹⁶

The Internal Revenue Service has also ruled that normal state law restrictions on the exercise of the widow's power during a period of legal incapacity do not preclude an interest from qualifying for the marital deduction.¹⁷ But care must be taken in this regard as was illustrated by the overzealous draftsmanship displayed in *Starrett v. Commissioner*.¹⁸ There, the decedent had given his wife a life estate with an unrestricted power to acquire the corpus of the trust. As a precaution, he had provided that in the case of his wife's legal incapacity or upon the appointment of a guardian, conservator or other custodian, her power would cease and her guardian, conservator or other custodian would be empowered to withdraw corpus for her. The estate contended that this provision accomplished no more than Rhode Island law would in any event, and perhaps not as much. But the first circuit found a hole in the argument. Under Rhode Island law the appointment of a guardian would only *suspend* her power, whereas the decedent had provided for it to *cease* under such conditions. In fact, the widow never became legally incapacitated and no guardian was ever appointed. But viewed from the point of the decedent's death, it was not clear that her power was exercisable "in all events." The Tax Court had held that a guardian, conservator or other custodian might be appointed upon the happening of events short of legal incapacity and this, too, would terminate her power.¹⁹

Had the decedent's will been silent on the problem of legal incapacity, both courts apparently assumed the trust would have qualified. Thus, the appointment of a guardian

¹⁵ Treas. Regs. § 20.2056(b)-5(g)(2).

¹⁶ Estate of Wilhelmina L. Benjamin, *supra* note 13.

¹⁷ Rev. Rul. 55-518, 1955-1 CUM. BULL. 384.

¹⁸ 223 F.2d 163 (1st Cir. 1955).

¹⁹ Frank E. Tingley, 22 T.C. 402 (1954).

for the widow is not an event deemed to "terminate" the widow's interest. The first circuit emphasized that the widow's powers were only suspended in such event, but the more basic consideration is that all powers would be subject to such contingency and a contrary rule would reduce the marital deduction to a nullity.

Relationship Between Sections 2041 and 2056

A consideration of the legislative history would seem to evince a basic purpose of assuring that any interest qualifying for the marital deduction would also qualify for inclusion in the gross estate of the surviving spouse, unless dissipated or given away during her lifetime. Yet it is plain that the regulations are not satisfied with a mere harmonious interplay between section 2041 and section 2056. Nor are the cases.²⁰ Under section 2041, property subject to a power of appointment is includible in the gross estate unless limited by an ascertainable standard, i.e., measurable in terms of the holder's needs for health, education and support.²¹ If measured by an unascertainable standard, such as the "comfort, welfare and happiness" of the widow, the property subject to the power would be included in the widow's gross estate²² upon her subsequent death, even though the decedent husband's estate would not be eligible

²⁰ *Pipe's Estate v. Commissioner*, 241 F.2d 210 (2d Cir.), *cert. denied*, 355 U.S. 815 (1957); *Starrett v. Commissioner*, 223 F.2d 163 (1st Cir. 1955).

²¹ Treas. Regs. §20.2041-1(c)(2). In many decisions, the surviving spouse's power was limited by an ascertainable standard and would thus not have even been included in the survivor's estate under §2041. *Peyton's Estate v. Commissioner*, 323 F.2d 438 (8th Cir. 1963), *affirming* 21 P-H Tax Ct. Mem. 1111 (1962) (invasion authorized for the "comfortable maintenance of my said wife and children"); *Estate of Elwood Comer*, 31 T.C. 1193 (1959) (to withdraw principal "for her maintenance, comfort and general welfare"); *Estate of E. W. Noble*, 31 T.C. 888 (1959) (to use corpus "for her maintenance, support and comfort"); *Estate of Thomas W. Tebb*, 27 T.C. 671 (1957) (to dispose of corpus "for her own maintenance, care and normal living expenses"); *Estate of Michael Melamid*, 22 T.C. 966 (1954) ("to use so much of it as she may need for the way of life to which she and I have been accustomed"). See also Rev. Rul. 55-395, 1955-1 CUM. BULL. 458.

²² *Strite v. McGinnes*, 330 F.2d 234 (3d Cir.), *cert. denied*, 379 U.S. 876 (1964).

for the marital deduction.²³ This disparity, along with the broader definition of a general power under section 2041 (to include powers exercisable in favor of creditors of the decedent or his estate), might be explicable in terms of an administrative safeguard to avoid the incidence of a double benefit in a close case, *i.e.*, allowance of the marital deduction to the husband's estate and exclusion from the widow's gross estate upon her subsequent death.²⁴ The wisdom of this lack of correlation will be discussed later.²⁵

In *Estate of May v. Commissioner*,²⁶ the widow was given a legal life estate in the residuary estate with the right, in her sole discretion, to invade principal for her "comfort, happiness and well-being." Upon the widow's death the residue of this property, "if any there be, after said life use thereof by my said wife," was to be divided among the decedent's children and grandchildren. Under New York law, the second circuit found that even these broad powers of invasion did not confer upon her the ability to appoint to herself.²⁷ Accordingly, the marital deduction

²³ See *Estate of May v. Commissioner*, 283 F.2d 853 (2d Cir. 1960), *cert. denied*, 366 U.S. 903 (1961).

²⁴ There might still be the possibility—albeit a rare one—of a double benefit in a case like the following. If the decedent (dying in 1955), created a trust in 1940, in which he retained a life interest, and the trust instrument provided that upon his death his wife would have a life interest with a general power of appointment (with the property passing to the children on default), these consequences would follow: The trust corpus would be included in the decedent's gross estate under § 2036(a)(1) and would be deemed to have passed to his wife under § 2056(e)(4). The decedent's estate would thus get the marital deduction but nothing would be included in the widow's estate if she didn't exercise her power, it being created prior to October 21, 1942. *Treas. Regs. § 2041(a)(1)*.

²⁵ *But see* *Security-Peoples Trust Co. v. United States*, 238 F. Supp. 40 (W.D. Pa. 1965), where, in deciding that a power vested in a trustee did not warrant any inclusion in the gross estate of the beneficiary under § 2041, the court felt that the marital deduction cases furnished a close parallel.

²⁶ *Supra* note 23.

²⁷ The court cited *Matter of Britt*, 272 App. Div. 426, 71 N.Y.S.2d 405 (3d Dep't 1947); *Matter of Briggs*, 101 Misc. 191, 167 N.Y. Supp. 632 (N.Y. Surr. Ct.), *modified*, 180 App. Div. 752, 168 N.Y. Supp. 597 (3d Dep't 1917), *modified and surrogate's decree aff'd*, 223 N.Y. 677, 119 N.E. 1032 (1918). These cases enunciate the so-called "good faith" doctrine, *i.e.*, that even when a widow is given broad powers of invasion and consumption, she must exercise such powers in good faith, and cannot waste or give away the property and thereby deprive the remaindermen of their interest.

was denied because the widow's power was not exercisable in "all events."

The estate in this instance apparently relied upon the legislative history to support its contention that, since the property subject to the power would be wholly includible in the widow's estate upon her subsequent death,²⁸ the marital deduction should be granted to the husband's estate to avoid double taxation. But the court found the statutory language too clear to merit reference to the statutory history. Moreover, *Pipe's Estate* had already set forth the requirement that the life tenant be able to appoint an interest to herself enabling her to devise the subject property before a marital deduction will be allowed.²⁹ That "double taxation" might result from the denial of the marital deduction to the husband's estate and the inclusion of the property in the widow's estate upon her subsequent death under section 2041 could not alter the clear mandate of the statute. That similar bequests might be treated differently in other states was not significant; the lack of uniformity was attributable to the decedent's disposition which must always be read in the light of the law of his state.

It also should be noted that importation into section 2056 of the "remoteness" test,³⁰ such as is used in the charitable deduction area, was specifically rejected in *Estate of Allen L. Weisberger*.³¹ In other words, it is of no help to marital deduction qualification to demonstrate that the likelihood of occurrence of the terminating contingency is negligible.

Necessity of a Testamentary Power

Since section 2056(b)(5) (and its 1939 code predecessor, section 812(e)(1)(F)) clearly indicates that

²⁸ See note 11, *supra*.

²⁹ *Pipe's Estate v. Commissioner*, *supra* note 20. The court regarded this ruling in *Pipe's Estate* to be dictum, asserting that the holding was based on the use of a mere legal life estate. A careful reading of Judge Waterman's opinion discloses no square ruling on this point.

³⁰ See Treas. Regs. § 20.2055-2(b), which provides that a charitable bequest which is conditioned upon the occurrence or non-occurrence of a precedent event will, nevertheless, give rise to a charitable deduction if the "possibility that the charitable transfer will not become effective is so remote as to be negligible." *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929).

³¹ 29 T.C. 217, 222 (1957).

powers may qualify "whether exercisable by will or during life," it may seem surprising that any question could arise as to whether the widow *must* be given a power to appoint by will to qualify a bequest for the marital deduction. Yet there has been a good deal of uncertainty on this point. Consider one of the earliest appellate decisions in the area, *Pipe's Estate v. Commissioner*.³² The widow was given a legal life estate in the residue of the decedent's estate, "with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof, for such purposes and in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death." Upon the widow's death, the identifiable remnants of the decedent's estate were to pass to certain named legatees.

The *Pipe* case arose under the 1939 code. At that time, section 812(e)(1)(F) required that the widow's interest be in trust to qualify, an artificial requirement abolished by the 1954 code, and, retroactively, by Section 93 of the Technical Amendments Act of 1958 as to decedents dying after April 1, 1948. Had the court rested its decision on the ground that the widow's interest was not in trust,³³ no important precedent for present purposes would have resulted³⁴ and the case could casually be dismissed as one not affected by Section 93 of the Technical Amendments Act of 1958.³⁵ But Judge Waterman, writing for himself and

³² *Supra* note 20.

³³ Compare the Tax Court's opinion, 23 T.C. 99 (1954).

³⁴ There is now substantial authority treating the life beneficiary as a trustee for fiduciary reporting purposes. *United States v. de Bonchamps*, 278 F.2d 127 (9th Cir. 1960); *Weil v. United States*, 180 F. Supp. 407 (Ct. Cl.), *cert. denied*, 364 U.S. 822 (1960); Rev. Rul. 61-102, 1961-1 CUM. BULL. 245. *But see Hirschmann v. United States*, 309 F.2d 104 (2d Cir. 1962). Several New York cases seemed to support this principle. *Keefe v. Keefe*, 257 N.Y. 604, 178 N.E. 814 (1931); *Peck v. Smith*, 227 N.Y. 228, 125 N.E. 91 (1919); *Seaward v. Davis*, 198 N.Y. 415, 92 N.E. 1107 (1910).

³⁵ See *Estate of Wallace S. Howell*, 28 T.C. 1193 (1957). See also *Estate of Harriet C. Evilsizer*, 27 T.C. 710 (1957) (where the estate did not even raise § 812(e)(1)(F) because of the absence of a trust).

Judge Medina, declined to base the decision on so narrow a ground.³⁶ Instead, the court ruled that Mrs. Pipe's power to consume was not an "unlimited power to invade." She could consume the corpus, but she could not appoint any part of the corpus to herself since whatever was left over at her death would pass to the decedent's named remaindermen. The fact that the unconsumed principal might be included in Mrs. Pipe's estate upon her subsequent death was not a sufficient basis for allowing a marital deduction if the specific statutory requirements were not met. There was no finding by the court that Mrs. Pipe could not give the property away during her lifetime or that she was even subject to good faith limitations under New York law. Rather, the mere inability to appoint the property by her will disqualified her interest.³⁷

The key language of Judge Waterman's opinion was as follows:

But even assuming, *arguendo*, that the bequest at bar did create a 'trust' under the law of New York that would comply with the minimal requirements of subsection 812(e)(1)(F), we must hold that it does not qualify for the marital deduction under that section. We cannot do otherwise, for a reading of this statutory provision and its apposite Treasury Regulations in their entirety makes it clear that Mrs. Pipe's power to invade and *consume* is not the type of 'unlimited power to invade' referred to in the Regulations. See U.S. Treas. Reg. 105, § 81.47a. During her lifetime no restraint whatsoever is imposed upon her power to consume or dispose of the principal of her life estate as she wishes. She has a power to consume, but she may not devise or bequeath any unconsumed corpus at her death to beneficiaries of her own choice. Thus her power under the terms of Mr. Pipe's will is not the 'unlimited power to invade' referred to in the Regulations, because to comply with that requirement, the 'power in the surviving spouse must be a power to appoint the corpus to herself as unqualified owner or to appoint the corpus as a part of her estate, that is, in effect, to dispose of it to whomsoever she pleases.' U.S. Treas. Reg. 105, § 81.47a. Or, in the language of the statute itself, the surviving spouse

³⁶ Judge Swan's dissent found the majority's approach too narrow and inconsistent with the basic purpose of the statute.

³⁷ See also *McIntyre v. United States*, 201 F. Supp. 401 (W.D. Ky. 1961); *Estate of Julius Selling*, 24 T.C. 191 (1955).

must be able to appoint the entire corpus 'free of the trust' to herself or her estate. This Mrs. Pipe cannot do, because as long as any of the corpus of her estate remains, it will be held 'in trust' for the named remaindermen.³⁸

Section 812(e)(1)(F) of the 1939 code required the widow to be able to appoint the entire corpus "free of the trust," a requirement not specifically imposed by the 1954 code in light of the elimination of the trust requirement. However, Treasury Regulations Section 20.2056(b)-5(g)(2) includes such a requirement,³⁹ and the thrust of *Pipe's Estate* is therefore not confined to the cases arising under the 1939 code.

It is an oversimplification, however, to say that *Pipe's Estate* required a testamentary power of appointment. What the second circuit thought was necessary was that the widow have the power to remove the property from the stricture of the trust or life estate so that she could then become the unqualified owner, and thus have all rights of an absolute owner, including the power of testamentary disposition. Finding that the widow did not have the power to confer upon herself the entire bundle of rights that constitute absolute ownership, the court denied the deduction. Thus, had the *Pipe* will created a trust for the widow and had the widow's powers during life included the power to remove the corpus from the trust, the court presumably would have upheld the marital deduction, even though the will did not give her a testamentary power of appointment.⁴⁰

³⁸ 241 F.2d 210, 213 (2d Cir. 1957).

³⁹ Treas. Regs. § 20.2056(b)-5(g)(2) provides:

The power of the surviving spouse must be a power to appoint the entire interest or a specific portion of it as unqualified owner (and free of the trust if a trust is involved, or free of the joint tenancy if a joint tenancy is involved) or to appoint the entire interest or a specific portion of it as a part of her estate (and free of the trust if a trust is involved), that is, in effect, to dispose of it to whomsoever she pleases.

⁴⁰ See *Hoffman v. McGinnes*, 277 F.2d 598 (3d Cir. 1960); *Stallworth v. Commissioner*, 260 F.2d 760 (5th Cir. 1958); *Newton v. Wiseman*, 2 Am. Fed. Tax R.2d 6352 (W.D. Okla. 1958), where a trust was created for the widow with respect to certain stock but the widow could sell the stock and dispose of the proceeds by will; *Estate of Leo A. Bourke*, 19 P-H Tax Ct. Mem. 496 (1960), where the widow could withdraw the entire corpus upon request.

Even so, the theory of *Pipe's Estate* is subject to serious question, although the second circuit has subsequently reaffirmed its position.⁴¹ Initially, it should be recalled that the regulations apparently do not interpret the "free of the trust" requirement quite so strictly. Treasury Regulations Section 20.2056(b)-5(g)(3) seems to provide that an unrestricted power of disposition during life, including the power to make gifts, will suffice.⁴² In other words, if the widow can give the property away, she is effectively disposing of it "free of the trust." While it is true she cannot dispose of it "free of the trust" in every way imaginable, she is empowered to do everything with the property during life that a fee simple owner could. Given the policy of the statute to equalize common law and community property states, the fact that the widow's estate, upon her subsequent death, would be obliged to include, as part of her gross estate, the undisposed remainder of such property might well be sufficient to justify the deduction. Whether she is to be deemed the "unqualified owner" of such property if she lacks the power of testamentary disposition depends on the manner in which one views that term in the context of a statute which provides for qualification of powers "exercisable by will or during life."

In any event, there is a considerable body of authority which either expressly or implicitly rejects the *Pipe* doctrine. Perhaps the leading case to the contrary is *McGehee v. Commissioner*,⁴³ where the surviving husband received realty "in fee simple . . . with full power to dispose of the same and to use the income and corpus thereof in such manner as he may determine, without restriction or restraint." At his death any property not disposed of was to pass to named

But see United States v. First Nat'l Trust & Sav. Bank, 335 F.2d 107 (9th Cir. 1964). In this case the widow was given a life estate in two residences with power to sell them and use the proceeds to buy another residence to which she would acquire a fee simple title. Because she could acquire another residence, the ninth circuit felt her powers were not unqualified in all events from the time of death.

⁴¹ See *Estate of May v. Commissioner*, *supra* note 23. See also *United States v. Lincoln Rochester Trust Co.*, 297 F.2d 891 (2d Cir.), *cert. denied*, 369 U.S. 887 (1962).

⁴² *But see* *Estate of Francis F. Field*, 40 T.C. 802 (1963).

⁴³ 260 F.2d 818 (5th Cir. 1958).

remaindermen. At first the marital deduction was denied because the bequest was not in trust. But shortly after the initial decision, the Technical Amendments Act of 1958 was passed, retroactively amending section 812(e)(1)(F) of the 1939 act to eliminate the trust requirement. The *McGehee* case was then submitted for rehearing, and this time the deduction was allowed. The Government had contended that even under the revised law the widower's power was not unrestricted. But the court perceived no good faith limitation nor any barrier to the widower's power to make gifts. On rehearing, no reference whatever was made to the *Pipe* case. Yet it would seem that the *McGehee* property was subject to the same defect deemed fatal in *Pipe*, the inability of the surviving spouse to give himself an unqualified interest during life which would later be subject to his testamentary disposition. The court did observe, however, that the gift over of the property undisposed of prevented the gift from being in fee, but it did not restrict or qualify the power of disposition.⁴⁴

In *Newton v. Wiseman*,⁴⁵ the widow was given the right to dispose of certain stock, with a gift over if she failed to exercise her power. The court first observed that the *Pipe* case was distinguishable, in that there was no restriction on the disposition the widow could make of the proceeds of any sale either during life or by will. But, in any event, the court thought that Judge Swan's dissent in *Pipe* represented the better rule.

In *Nettz v. Phillips*,⁴⁶ the widow received property under a joint and mutual will "absolutely and in fee simple." Upon her death she was found contractually obligated to pass such property to persons named in the joint will. But during her lifetime there was, under the terms of the will and under Iowa law, no limitation whatever upon her

⁴⁴ *McGehee* was followed in *Bone v. United States*, 238 F. Supp. 97 (W.D. Ark. 1965); *Carlson v. Patterson*, 190 F. Supp. 452 (N.D. Ala. 1961); *Boyd v. Gray*, 175 F. Supp. 57 (W.D. Ky. 1959), *on remand from* 261 F.2d 914 (6th Cir. 1958). These cases were based on similar facts and were also decided without reference to *Pipe*.

⁴⁵ 2 Am. Fed. Tax R.2d 6352 (W.D. Okla. 1958).

⁴⁶ 202 F. Supp. 270 (S.D. Iowa 1962).

right to dispose of the property as she saw fit.⁴⁷ The court was thus duly confronted with the *Pipe* and *McGehee* lines of cases. It chose the latter, pointing to the fact that both statute and regulations seemed to contemplate powers exercisable by will or during life.⁴⁸

What appeared to be the final chapter on this question arose in *Piatt v. Gray*,⁴⁹ where the widow was given the right to expend principal whenever, in her opinion, it was necessary for her "maintenance, comfort or well-being," without being required to account. The decedent's sister and her children were to take the "remainder" of his estate. The district court,⁵⁰ relying on *Pipe*, had held that the lack of a testamentary power of disposition was fatal to qualification. On appeal, the Government conceded that this requirement was not necessary, and the sixth circuit held for the Government on other grounds.

However, there was added a disappointing epilogue to the story in *Estate of Francis F. Field*.⁵¹ There, the widow was given the power to consume the decedent's "entire estate for any purpose which she shall deem advisable." In the event the widow did not exercise her power, the children were to receive the corpus. In a proceeding to construe the will, it was determined that the widow had "the unrestricted power exercisable at any time during her life without accounting to any person whomsoever—to use all or any part of the trust property, and to dispose of or consume it in any manner, including the power to dispose of it by gift."

⁴⁷ Compare *Allen v. United States*, 242 F. Supp. 687 (E.D.N.Y. 1965). Here the widow was given the decedent's entire estate provided she filed an agreement with the appropriate surrogate requiring her to leave the bulk of her estate to the decedent's four children, one of whom was a daughter of a prior marriage. Otherwise, she was to be given her statutory share. The widow elected to file the required agreement. The effect of this disposition was found to give the widow a life estate with a broad but not unlimited power of consumption. She was subject to good faith limits, could not appoint to herself or waste the assets. Accordingly, the marital deduction was denied.

⁴⁸ Cf. *Estate of James Mead Vermilya*, 41 T.C. 226 (1963).

⁴⁹ 321 F.2d 79 (6th Cir. 1963).

⁵⁰ 9 Am. Fed. Tax R.2d 1866 (W.D. Ky. 1962).

⁵¹ 40 T.C. 802 (1963).

Although there were various circumstances present suggesting the probate decree was collusive, the Tax Court found it unnecessary to pass on such question. To qualify, the widow had to be able to appoint the property involved to herself or her estate. The Tax Court perceived no such power in the decedent's will. The widow could not short-circuit the interest of the children by appointing unconsumed corpus free of the trust to her own estate. Even the power to give the property away was not deemed enough and the marital deduction was denied.

While the "all events" test may have been satisfied under Treasury Regulations Section 20.2056(b)-5(g)(3), the quantum of the widow's power was simply held insufficient. The Tax Court thus traveled the full circle back to *Pipe's Estate*.

Necessity of the Power to Make Gifts

It now seems to be established that a mere power of consumption is never enough for marital deduction qualification, a point well illustrated in *Estate of Thomas J. Semmes*.⁵² In this instance, the widow was sole trustee and was authorized "to encroach upon the principal or corpus of said trust property for her own benefit, at any time she sees fit, without accounting" to the decedent's children who were designated remaindermen following the widow's death. Upon the death of the children and their issue during the widow's life, the trust was to terminate and the trust property was to belong "absolutely and totally" to the widow to do with as she pleased.

The Tax Court conceded that the widow's right to encroach for her own benefit was unrestricted. But she could not give the property away nor could she appoint the unused corpus to herself as unqualified owner. Elaborate provisions for the disposition of the trust corpus upon the widow's death and the contrasting absoluteness of the wife's control upon the prior death of the children and their issue were found indicative of an insufficiently pervasive

⁵² 32 T.C. 1218 (1959), *aff'd per curiam*, 288 F.2d 664 (6th Cir. 1961).

power. The sixth circuit agreed with the Tax Court's analysis and affirmed its decision.

Neither court commented on the following sentence in Treasury Regulations Section 20.2056(b)(5)-(g)(3):

Likewise, if there are any restrictions either by the terms of the instrument or under applicable local law, on the exercise of the power to consume property (whether or not held in trust) for the benefit of the spouse, the power is not exercisable in all events.

This sentence suggests that an *unrestricted* power to consume, as in *Semmes*, might be sufficient. The regulations do go on to require that there also be the power to give the property away; but if such a power of gift is necessary, then a power of consumption would normally not be significant since a testator rarely invests his spouse with unlimited power of gift but only a limited power of consumption. Hence, *Semmes* presented a good vehicle for determining whether this requirement of the regulations (not the statute) that the widow must have the power to give the property away is in accord with the legislative history and the related (more accurately, unrelated) provisions dealing with the inclusion in the widow's estate upon her subsequent death of powers of consumption under section 2041.⁵³ But neither court perceived any significant problem in this regard and the marital deduction was denied.

In *Estate of William A. Landers, Sr.*,⁵⁴ the widow was given certain property "to have and use as long as she lives and remains single." There followed a gift over at her death of "whatever of this property remains." These provisions were interpreted somewhat ambiguously in a construction proceeding, but the Tax Court understood the construction to give the widow a life estate with a power to use the property and invade corpus "apparently at her own whim." Under Georgia law she could use the property freely with no liability for waste, but she could not give the property away. This defect caused the widow's interest to fall short of the "all events" test and the marital de-

⁵³ See Treas. Regs. 20.2041-1(b)(1).

⁵⁴ 38 T.C. 828 (1962).

duction was denied. In *Piatt v. Gray*,⁵⁵ the sixth circuit, carefully reviewing Kentucky law, found that the widow's right to expend principal for her "maintenance, comfort or well being" was not the requisite unqualified power necessary for allowance of the marital deduction. She could not give the principal away nor use it as she saw fit, nor commit willful waste. It accordingly felt compelled to chalk up one more victim for the "all events" test.

The Effects of Local Law

If the surviving spouse must have the power to make gifts to qualify the power under section 2056(b)(5), consideration of other lesser restrictions imposed by local law would seem superfluous. Yet a number of decisions have been reached on such other grounds. The most important of these is the so-called "good faith limitation," *i.e.*, the requirement that she exercise her powers in a manner so as not to frustrate unfairly the decedent's testamentary scheme.⁵⁶ In a sense, the application of the "good faith" test may be but another way of analyzing whether there exists the power to make gifts, but it also involves a somewhat broader restriction on the widow's powers.

Thus, in *Commissioner v. Ellis' Estate*,⁵⁷ the surviving widow was given the right to all the net income of a trust, except that principal was to be invaded to assure her of at least \$5,000 per year. In addition, she was authorized to invade the trust corpus should she "require" sums in excess of \$5,000, she, and she alone, to be the judge of how much was to be required. The Tax Court, pointing to the fact that the trust corpus would be includible in the widow's estate upon her subsequent death, under section 2041, had allowed the deduction.⁵⁸ But the third circuit construed Pennsylvania law to impose a "good faith" limit on the exercise of her power.⁵⁹ She could not give the property

⁵⁵ *Supra* note 49.

⁵⁶ See note 23 *supra*.

⁵⁷ 252 F.2d 109 (3d Cir. 1958).

⁵⁸ 26 T.C. 694 (1956).

⁵⁹ The court cited: *Rumsey's Estate*, 237 Pa. 448, 451, 135 Atl. 119, 120 (1926); *Zumbro v. Zumbro*, 69 Pa. Super. 600, 603 (1918).

away or prefer certain heirs or beneficiaries.⁶⁰ Accordingly, she could not exercise her powers "in all events."

The Tax Court in *Ellis' Estate* had read *Starrett* as suggesting that possible limitations arising by operation of local law should not disqualify the power. With respect to the widow's obligation to exercise her power "honestly" this was a reminder that she was to consume and not donate the corpus. It observed:

This rule applies to every such power to invade or consume the principal, however broad. If its operation is to prevent a power subject thereto from being 'unlimited' we must, in effect, hold that in Pennsylvania it is impossible to form a trust subject to a power to consume corpus which may qualify for the marital deduction under section 812(c)(1)(F). This we are not prepared to do.⁶¹

No emphasis was given by either court to the fact that the invasion of principal was to occur only as the widow "required," a distinction later deemed crucial.⁶² But for the third circuit in *Ellis* a strict interpretation of the statutory requirements was necessary to fulfill the congressional intent.⁶³

Two years later, the third circuit was again confronted with a similar question in *Hoffman v. McGinnes*.⁶⁴ This time the widow was empowered:

to use and spend any or all of the principal of my said estate, if she so desires, and upon her requests made to said. . . . Trustees, they shall pay to her from time to time any part of the principal of my estate she may desire and said trust shall cease as to that part of the principal so paid to her.

It is my intention that my said wife . . . shall have the whole income and interest from my estate and use and spend any part or all of the principal that she may desire during her lifetime.

⁶⁰ *Degenkolv v. Daube*, 143 Pa. Super. 579, 586, 18 A.2d 464, 467 (1941); *In re Tyson's Estate*, 191 Pa. 218, 226, 43 Atl. 131, 133 (1899).

⁶¹ *Supra* note 58, at 700.

⁶² *Hoffman v. McGinnes*, *supra* note 40.

⁶³ It is questionable, however, whether property subject to such a power would even be included in Mrs. Ellis' estate. Compare *National Bank v. United States*, 181 F. Supp. 851 (D.C. Mass. 1960), with *Strite v. McGinnes*, 330 F.2d 234 (3d Cir.), cert. denied, 379 U.S. 876 (1964).

⁶⁴ 277 F.2d 598 (1960).

The court found the widow's power of withdrawal unrestricted and allowed the marital deduction. *Ellis' Estate* was distinguished because there withdrawals were to be made as "required" while in *Hoffman* they were to be made as "desired." Moreover, the decedent's intention not to inhibit his wife was shown by his explicit direction that the trust was to cease once withdrawn by the widow. Also noted was the reiteration of the decedent's intention showing a dominant concern for the widow.

The court felt that a more explicit direction to give the widow an unrestricted power would have been difficult to create. Not even good faith limited her power.⁶⁵ Presumably, although the court did not explicitly so find, she could have given the corpus away. Since the widow could effect a withdrawal "free of the trust," any such property remaining at her death would have been subject to her testamentary disposition and the defect noted in *Pipe* was thus not present.

In *United States v. Lincoln Rochester Trust Co.*,⁶⁶ the full thrust of state "good faith" limitations was sharply illustrated. The widow was given the "right to use any part of the principal" of the residue of the estate. After her death, provision for named remaindermen was made. The local surrogate's court indicated this meant that the widow had an unlimited power to consume the principal. But the second circuit understood this construction to be subject to the usual limitations of "good faith," a conclusion buttressed by the fact that there was nothing in the will to indicate an intent to dispense with such limitations. Further, she could not dispose of any part of principal by gift or by will.

In its concluding paragraph, the court observed:

The ruling is quite technical, but unfortunately that is too often so in tax matters. There may be arguments of policy for change in the statutory requirements to broaden the marital deduction, but this is a matter for the Congress, which, with the problem plainly before it, failed in the Technical Amend-

⁶⁵ Only one Pennsylvania lower court decision was found relevant. *Estate of George M. Morriss*, 26 Dauphin County Rep. 136 (Orphans' Ct. 1922).

⁶⁶ 297 F.2d 891 (2d Cir.), *cert. denied*, 369 U.S. 887 (1962).

ments Act of 1958 to remove or modify the requirement that the power be exercisable in all events as a condition of the grant of the marital deduction in this situation.⁶⁷

Recently, in *Cavanaugh v. United States*,⁶⁸ the widow was given the right "to use so much of the principal as she may desire for her own personal needs." She was to have the sole option to determine her needs and the use to which the estate was to be placed. At her death there was a remainder over. The court found that Indiana law imposed a "good faith" requirement on the exercise of her power, that she could not appoint to herself in all events, and that the bequest was therefore not eligible for the marital deduction.⁶⁹

Sometimes local law goes quite far in limiting the powers of the surviving spouse. In *Collings v. United States*,⁷⁰ the widow was, in one paragraph, bequeathed the residue of the decedent's estate. In the next paragraph, "any part of my estate remaining undisposed of at the time of the death of my said wife" was bequeathed to others. Construction proceedings reached the Kentucky Court of Appeals, which held that her power could be exercised only for her support and comfort. Under such circumstances, the marital deduction was, of course, denied.

Two cases have held that under Maryland law, an apparently unrestricted testamentary power cannot be exercised by the widow in favor of her estate in the absence of a specific direction to that effect.⁷¹ Many estates have,

⁶⁷ *Id.* at 893-94.

⁶⁸ 16 Am. Fed. Tax R.2d 146, 824 (S.D. Ind. 1965).

⁶⁹ See also *Matteson v. United States*, 147 F. Supp. 535 (N.D.N.Y. 1956); *Allen v. United States*, *supra* note 47.

⁷⁰ 201 F. Supp. 266 (W.D. Ky. 1961).

⁷¹ *Pierpont's Estate v. Commissioner*, 336 F.2d 277 (4th Cir. 1964); *Estate of William C. Allen*, 29 T.C. 465 (1957). By way of contrast, consider *Geyer v. Bookwalter*, 193 F. Supp. 57 (W.D. Mo. 1961). The decedent gave his "home place" to his wife. She was to have "[the] good and full right to sell and convey fee simple title thereto, with such easements as are appurtenant, and not account for the proceeds thereof." If unsold, the property was to pass to his children surviving his wife. The Government contended the widow had a mere power of sale. But the court felt that she could also "convey" the property without consideration; that the word "and" meant "or"; that the word "proceeds" did not imply consideration. The use of the phrases "home place" and "fee simple" and the lack

of course, invoked the aid of local courts to buttress their interpretation of the decedent's will in pursuit of the marital deduction. This has often brought into focus the question of whether such local court constructions were the products of a genuinely contested litigation or "collusive decrees" which the federal courts should properly ignore.⁷² This problem is by no means limited to the marital deduction area, however, and its complexities are beyond the scope of the present discussion.⁷³

Possibility of Enjoyment or Exercise of Power by Others

Even though the widow be designated the sole trustee, the possibility that some one else will derive benefit from the property will operate to preclude the marital deduction.⁷⁴ As the statute provides, the widow must be able to exercise her powers *alone* and in all events.

In *Estate of Theodore Geddings Tarver*,⁷⁵ the income was to be used by the widow "for her support and maintenance, and for the education, support and maintenance of our children, in her discretion." Invasions of principal were to be made "as and when she may demand, for her use and/or the use or benefit of our children as she deems advisable." Upon the widow's death, the trust was to be

of accountability led the court to believe that the widow had the unrestricted power to give the property away. Of course, a mere power of sale is not a power to appoint if the proceeds remain subject to the limitations of the trust. *Markoff v. United States*, 187 F. Supp. 805 (D.C.R.I. 1960).

⁷² A partial list of such instances includes the *Lincoln Rochester, Landers, Stalkworth* and *Field* decisions; *Estate of Peyton v. Commissioner*, 323 F.2d 438 (8th Cir. 1963); *Shedd's Estate v. Commissioner*, 237 F.2d 345 (9th Cir. 1956), *cert. denied*, 352 U.S. 1024 (1957); *In re Sweet's Estate*, 234 F.2d 401 (10th Cir. 1956), *cert. denied*, 352 U.S. 878 (1957); *Willcox v. United States*, 16 Am. Fed. Tax R.2d 146, 822 (E.D. Va. 1965); *Northwest Security Nat'l Bank v. Walsh*, 203 F. Supp. 263 (S.D.S.D. 1962), *appeal dismissed*, 308 F.2d 367 (8th Cir. 1963); *Dake's Estate v. United States*, 8 Am. Fed. Tax R.2d 6059 (W.D.N.Y. 1961); *Gordon v. United States*, 163 F. Supp. 542 (W.D. Mo. 1958); *National Bank of Commerce v. United States*, 1 Am. Fed. Tax R.2d 2155 (E.D. Va. 1958).

⁷³ See 1 MERTENS, LAW OF FEDERAL GIFT & ESTATE TAXATION § 10.19-10.23 (1959 ed.).

⁷⁴ Treas. Regs. 20.2056(b)-5(a).

⁷⁵ 26 T.C. 490 (1956), *aff'd on this issue*, 255 F.2d 913 (4th Cir. 1958).

divided into shares for each of the decedent's children. The Tax Court refused to infer that the widow had an untrammelled discretion to demand all the corpus for her own benefit under South Carolina law. A reading of the will as a whole demonstrated the decedent's solicitude for his children. Amounts appropriated for the use of any child were to be reported to the trustee and deducted from his share on ultimate distribution. Emergency provisions for the benefit of the decedent's children after the widow's death were cited. The decedent contemplated that the corpus of certain trusts he intended to set up during his life for his children might under certain circumstances become part of the testamentary trust.

The fourth circuit adopted the views of the Tax Court, quoting extensively from its opinion. Thus, the presence of other beneficiaries for whom the decedent manifested substantial concern was enough to disqualify the power, although for section 2041 purposes, the power may have been broad enough to warrant inclusion in the widow's gross estate upon her subsequent death.

In several other cases, the widow's powers have been subject to the control of other persons and thus were not exercisable *alone* and in all events. In *Estate of Morton H. Spero*,⁷⁶ the widow and a bank were joint trustees. As such they could invade for the "comfortable maintenance" of either the widow or her children. At her death she could appoint the then remaining principal to anyone, including her estate. There was, however, no certainty any portion of the trust would then be remaining because of the trustees' power of invasion. In *Estate of Allen L. Weisberger*,⁷⁷ the deduction was lost when the trustee was empowered to divert income from the widow to her sons for their "maintenance and education."⁷⁸

In *Dexter v. United States*,⁷⁹ the trustees were *directed* to pay net income to the widow but *authorized* and

⁷⁶ 34 T.C. 1116 (1960).

⁷⁷ 29 T.C. 217 (1957).

⁷⁸ See also *Flesher v. United States*, 238 F. Supp. 119 (N.D. W.Va. 1965); *Thomas v. United States*, 207 F. Supp. 609 (N.D. Ohio 1962), *aff'd per curiam*, 317 F.2d 519 (6th Cir. 1963); *Estate of Raymond Parks Wheeler*, 26 T.C. 466 (1956).

⁷⁹ 163 F. Supp. 442 (D.C. Mass. 1958).

empowered to invade principal as she might request in writing. The trustees were exhorted to protect the widow against privation. The court found these provisions did not give the widow absolute control. To the contrary, they indicated that the trustees were to have discretion in refusing to accede to the widow's requests and this discretion, of course, was incompatible with the requirements for qualification.

In *Gelb v. Commissioner*,⁸⁰ the widow was given: (1) all the net income of the residuary trust; (2) the amount of principal necessary to assure her at least \$10,000 per year if net income was less than that figure; (3) the right to withdraw up to \$3,000 of principal for each daughter that might marry if the widow wished to make her a wedding gift. The trustees, of whom the widow was one of three, were also empowered (4) to withdraw up to \$5,000 per year of principal for the "proper support, maintenance, education and up-bringing" of his daughter whom he "particularly" wished to provide for. At death, the widow could appoint the trust corpus by will, and at issue was the extent to which such power was limited by these intervening provisions.

The possibility that the widow in her individual capacity might wish to make wedding gifts gave the court no concern. This was for the widow to demand or not to demand. But provision (4) for the daughter's benefit could not satisfy the marital deduction requirements of exclusive control by the widow. Even though the widow was trustee, there was no certainty she would remain so throughout her life.⁸¹ In addition, equity would not permit her

⁸⁰ 298 F.2d 544 (2d Cir. 1962).

⁸¹ The court distinguished in this respect *Miller v. Dowling*, 52 Am. Fed. Tax R. 1969, 1956-1 U.S. Tax Cas. ¶11,646 (S.D.N.Y. 1956), where the trustees could terminate a trust (otherwise qualifying) for the widow and pay the corpus over to the children. The widow was one of the trustees, but the Government argued she need not necessarily remain so and thus others might some day be able to terminate her interest. But the district court found that if the widow became incapacitated, a successor trustee would be obliged to protect her interest under New York law and the power to terminate could not be exercised in derogation of her rights. But no similar reasoning protected Mrs. Gelb from invasion for her daughter in the event she was not serving as trustee.

to arbitrarily veto payments for her daughter for the purposes stated by the testator. But the entire deduction was not lost. The daughter's yearly \$5,000 interest (for the joint lives of mother and daughter) could be actuarially valued and when this was done, the remaining portion subject only to the widow's control could properly constitute a "specific portion" of the trust; notwithstanding the Treasury Regulations to the contrary.⁸²

The decedent in *Gelb* could have avoided all difficulty merely by permitting the widow unqualifiedly to invade corpus to the extent of \$5,000 per year. He would, of course, have had to rely on the widow's judgment in appropriately maintaining their daughter but this is usually a safe risk. Alternatively, a separate fund could have been set aside for the daughter which probably could accomplish its purpose at a figure considerably less than the actuarial value determined in *Gelb*. Moreover, other courts might not agree that actuarial tables provide the requisite certainty demanded by the "all events" test.

CONCLUSION

This survey of the area of marital deduction powers discloses a not altogether satisfactory state of the law from several standpoints. In the first place, a substantial number of marital bequests have failed to qualify on technical grounds that seem excessively stringent. As noted, Congress was primarily concerned that the portion of an estate qualifying for the deduction should be included in the estate of the surviving spouse, if not dissipated by her during her lifetime. The statute as written, however, went further, apparently to be sure that a deductible interest was not excludible from the widow's estate. The regulations went further yet in the Internal Revenue Service's zeal to protect the Treasury, and some courts have been more stringent than even the regulations. The result has been that many decisions disqualified interests that would clearly be included in the widow's estate.

⁸² Treas. Regs. 20.2056(b)-5(c).

Since the marital deduction is of great importance in determining the applicable estate tax, the resultant harshness of unnecessarily technical requirements has led to an uneven application of the law, divergences on numerous critical points, and considerable variance in the characterization process which depends in substantial part on variant state laws. These results are to some extent unavoidable in view of the necessarily complex rules which must govern, be they liberal or strict. But they, nevertheless, have in fact tended to undermine the "national system" of estate taxation which Congress was plainly hopeful of achieving.

Moreover, it is apparent that a considerable amount of litigation has arisen in the area; it is certainly one of the oft-recurring problems in the estate tax field. Such litigation causes not only costly delay and expense, but it has projected the federal courts into the role of determining important questions of state law and in an atmosphere where non-tax considerations may not be given adequate weight. This is without reference to "collusive decrees" which have led to vexing questions of federal-state relations, but which will probably occur no matter where the line is drawn.

From a planning point of view, the careful draftsman may have no choice but to considerably restrict his estate plan if he wishes to be sure of the marital deduction. This could result in giving the widow a greater degree of control than might perhaps be wise.

It would therefore appear desirable to ameliorate the effects of the "all events" test, and two alternative (or possibly supplemental) methods suggest themselves. First, the powers qualifying for marital deduction purposes under section 2056 could be correlated to those qualifying for inclusion under section 2041. What qualifies for the deduction would therefore, by definition, be includible in the widow's estate. Secondly, section 2041 inclusions could be defined to include all interests subject to powers which have been judicially or administratively determined to merit the marital deduction.⁸³ This may occasionally require the

⁸³ This would avoid the possibility that different courts at different times might adopt conflicting views of the instrument creating the power resulting in either dual inconsistent benefits (*i.e.*, full deduction to husband's estate,

widow to seek to disallow the deduction, if it is to her advantage to do so, but it is doubtful that this will be a significant problem since she will usually be able to minimize her own estate's tax if she wishes to.

Almost twenty years of experience have taught that the "all events" test is unnecessarily harsh. It now seems appropriate to adopt a fairer and less contentious standard.

no inclusion in widow's estate), or no benefit to either estate (*i.e.*, no deduction to husband's estate, inclusion in widow's estate).